

Gan Jye v Yap Hong Chiang**A**

HIGH COURT (TEMERLOH) — ORIGINATING SUMMONS NO 24–30 OF
2002
RAMLY ALI J
9 APRIL 2002

Land Law — *Restraint on dealings* — *Caveats* — *Application for removal of* — *Procedure to be adopted by court* — *Whether defendant can prove that he has a caveatable interest in the land when he entered the caveat* — *Whether plaintiff an aggrieved party and entitled to apply to court for removal of defendant's caveat* — *National Land Code s 327(1)*

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The plaintiff, as a successful purchaser in a public auction in respect of a land, brought an action against the defendant to remove a private caveat entered by the defendant. The defendant claimed that he had purchased the said land in question from the vendors vide two sale and purchase agreements dated 31 January 1975 and 28 February 1978. The vendors who had signed both the agreements had cited that they were the 'beneficial and registered owners' of the land in question. In actual fact, the registered owner of the said land was, at all material times, Eng Kwee & Sons Construction Sdn Bhd. The said land had never been registered under the vendors name personally. The defendant also claimed that he paid the purchase price of RM76,000 sometime on 28 February 1978. However, the title of the land had not been transferred to the defendant until now.

C**D****E****Held:**

- (1) The plaintiff's right or interest in the land was derived from a judicial process through an order for sale, which was legally granted by the court. His right or interest in the land started when he successfully bid for the land and paid the deposit. In fact, in this case, the plaintiff had already paid the full price of the land before this application came up for hearing. Though the plaintiff may have had knowledge of the caveat earlier, it did not prevent him from being an aggrieved person for the purpose of s 327(1) of the National Land Code ('the Code'); *BSN Commercial Bank (M) Bhd v Thomas Selvaraj Soosai* [1998] 4 CLJ Supp 97 and *Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd* [1992] 2 MLJ 650 followed (see p 633C–D).
- (2) The plaintiff in the present application was therefore an 'aggrieved party' and therefore was entitled in law (s 327(1) of the Code) to apply to the court to remove the defendant's caveat and the court may exercise its powers accordingly under the said s 327(1) to consider and to grant the application as it thinks fit (see p 633H–I).
- (3) The defendant entered his private caveat on 10 October 1996, ie more than 18 years after 28 February 1978. By that time, whatever action he wished to have taken to enforce the

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- A** agreements would have been time barred and the agreements had become unenforceable. That being the case, the defendant had no caveatable interest when he entered the caveat on 10 October 1996 and therefore, the caveat ought to be removed (see pp 635H–636A).
- B** (4) The court was satisfied that the defendant had failed to show that he had a caveatable interest when he entered the caveat on 10 October 1996. Therefore, he failed to pass through the first stage established in *Luggage Distributor*. There was no serious question meriting a trial in the present case. The defendant had also failed to pass through the second stage in proving his claim.
- C** The balance of justice or the balance of convenience also lay in favour of the plaintiff, ie for the removal of the defendant's caveat (see pp 636F, 637B, 639B); *Luggage Distributors (M) Sdn Bhd v Tan Hor Tang* [1995] 1 MLJ 719 followed.

D [Bahasa Malaysia summary]

- Plaintif, sebagai pembeli yang berjaya di dalam satu perlelongan awam berhubung dengan sebidang tanah, telah memulakan tindakan terhadap defendan untuk membatalkan satu kaveat persendirian yang telah dimasukkan oleh defendan. Defendan menuntut bahawa beliau telah membeli tanah yang dipersoalkan daripada penjual-penjual melalui dua perjanjian jualbeli bertarikh 31 Januari 1975 dan 28 Februari 1978. Penjual-penjual yang telah menandatangani kedua-dua perjanjian tersebut telah menyebut bahawa mereka adalah 'tuanpunya benefisial dan berdaftar' bagi tanah yang dipersoalkan itu.
- E** Pada hakikat yang sebenarnya, tuanpunya berdaftar tanah tersebut adalah, pada setiap waktu yang material, Eng Kwee & Sons Construction Sdn Bhd. Tanah tersebut tidak pernah didaftarkan atas nama penjual-penjual tersebut secara peribadi. Defendan juga menuntut bahawa beliau telah membayar harga belian sebanyak RM76,000 lebih kurang pada 28 Februari 1978. Walau bagaimanapun, hak milik tanah tersebut masih belum dipindahkan kepada defendan sehingga kini.
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Diputuskan:

- H** (1) Hak atau kepentingan plaintif di dalam tanah tersebut telah diperolehi daripada proses kehakiman melalui satu perintah jualan, yang mana telah secara sah diberikan oleh mahkamah. Hak atau kepentingan beliau ke atas tanah tersebut bermula ketika beliau telah berjaya di dalam penawaran untuk tanah tersebut dan membayar deposit baginya. Malahan, di dalam kes ini, plaintif telahpun membayar harga penuh tanah tersebut sebelum permohonan ini tiba untuk pembicaraan. Meskipun plaintif mungkin mempunyai pengetahuan mengenai kaveat tersebut pada awalnya, ianya tidak menghalang beliau daripada
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- menjadi orang yang terkilan bagi tujuan s 327(1) Kanun Tanah Negara ('Kanun tersebut') (lihat ms 633C–D); *BSN Commercial Bank (M) Bhd v Thomas Selvaraj Soosai* [1998] 4 CLJ Supp 97 dan *Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd* [1992] 2 MLJ 650 diikut. **A**
- (2) Plaintiff dalam permohonan semasa adalah suatu 'pihak terkilan' dan dengan itu adalah berhak di sisi undang-undang (s 327(1) Kanun tersebut) untuk memohon kepada mahkamah bagi membatalkan kaveat defendan dan mahkamah boleh melaksanakan kuasa-kuasanya berikutan itu di bawah s 327(1) untuk mempertimbang dan membenarkan permohonan tersebut sepertimana yang ianya fikirkan sesuai (lihat ms 633H–I). **B**
- (3) Defendan telah memasukkan kaveat persendirian beliau pada 10 Oktober 1996, iaitu lebih daripada 18 tahun selepas 28 Februari 1978. Pada ketika itu, apapun tindakan yang beliau ingin ambil untuk menguatkuasakan perjanjian-perjanjian tersebut tentunya telah dihalang oleh masa dan perjanjian-perjanjian tersebut menjadi tidak boleh dikuatkuasakan. Oleh kerana keadaan yang sedemikian, defendan tidak mempunyai kepentingan yang boleh dikaveatkan ketika beliau memasukkan kaveat tersebut pada 10 Oktober 1996 dan dengan itu, kaveat tersebut haruslah dibatalkan (lihat ms 635H–636A). **C**
- (4) Mahkamah berpuashati bahawa defendan telah gagal untuk menunjukkan bahawa beliau mempunyai kepentingan yang boleh dikaveatkan ketika beliau memasukkan kaveat tersebut pada 10 Oktober 1996. Oleh itu, beliau gagal melepasi peringkat pertama yang ditetapkan di dalam *Luggage Distributor*. Tidak terdapat persoalan yang serius yang mewajarkan satu perbicaraan dalam kes semasa. Defendan telah juga gagal melepasi peringkat kedua dalam membuktikan tuntutan beliau. Imbangan keadilan atauimbangan keselesaan juga memihak kepada plaintiff, iaitu untuk pembatalan kaveat defendan (lihat ms 636F, 637B, 639B); *Luggage Distributors (M) Sdn Bhd v Tan Hor Tang* [1995] 1 MLJ 719 diikut.] **D**
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Notes

For cases on caveats generally, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3015–3328.

Cases referred to

- BSN Commercial Bank (M) Bhd v Thomas Selvaraj Soosai* [1998] 4 CLJ Supp 97 (folld)
- Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 (refd)
- ex parte Sidebotham* (1880) 14 Ch D 458 (refd)
- Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd* [1992] 2 MLJ 650 (folld)

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- A** *Luggage Distributors (M) Sdn Bhd v Tan Hor Tang* [1995] 1 MLJ 719 (folld)
Murugappa Chettiar Lakshamanan v Lee Teck Mook [1995] 1 MLJ 782 (refd)
Wu Shu Chen (Sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin [1997] 2 MLJ 487 (refd)
- B**

Legislation referred to

- Companies Act 1965
 Limitation Act 1953 s 9
- C** National Land Code ss 256(3), 257(1), 327(1), 340(1)(2)
- Lim Jit Hing (Sazali & Lim)* for the plaintiff.
Wan Noor Suzana Wan Sulaiman (Bahari Choy & Nongchik) for the defendant.
- D** **Ramly Ali J:** The plaintiff, as a successful purchaser in a public auction in respect of lands held under Geran No 5461, Lot No 87, Seksyen 8; Geran No 5462, Lot No 88, Seksyen 8 and Geran No 5463, Lot No 89, Seksyen 8, Bandar Mentakab, Daerah Temerloh, Pahang Darul Makmur, brought an action against the defendant vide encl 4, by way of an originating summons to remove a private caveat entered by the defendant vide Private Caveat Perserahan No 2188/96 on the said land, on 10 October 1996.
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The defendant claimed that he had purchased the said land in question from the vendors vide two sale and purchase agreements dated 31 January 1975 and 28 February 1978. The vendors who had signed both the agreements were Eng Kwee, Eng Kin Soon, Eng Kim Hai, and Eng Cim Siah, who in the preambles of both the agreements, had cited that they were the 'beneficial and registered owners' of all the lands in question. In actual fact, the registered owner of the said lands was, at all material times, Eng Kwee & Sons Construction Sdn Bhd. The said land has never been registered under the vendors names personally. The defendant also claimed that he has paid the purchase price of RM76,000 sometime on 28 February 1978. However, the title of the land had not been transferred to the defendant until now. Nothing was done by the defendant after that date until 1996 when the said land was charged in favour of Malayan Banking Bhd to secure a loan facility. On 26 September 1996, the said land was still registered in the name of Eng Kwee & Sons Construction Sdn Bhd, and on the record, was free from any encumbrances. The said land was charged in favour of Malayan Banking Bhd vide Pers No 8023/1996 Vol 422 Fol 42 dated 26 September 1996. The chargor was Eng Kwee & Sons Construction Sdn Bhd, a company.

- H** It was only after the said land was charged (on 26 September 1996) that the defendant entered his private caveat on the said land on 10 October 1996, ie about 14 days after the charge was registered.
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On 29 August 2001, this court granted an order for sale of the said land pursuant to ss 256 and 257 of the National Land Code ('the NLC') vide

Saman Pemula No 24–172–2000, in favour of the chargee, Malayan Banking Bhd. On 26 October 2001, at a public auction, the plaintiff successfully bid for the purchase of the said land at a price of RM582,800. On the same day (26 October 2001) he paid a sum of RM58,280 as the deposit and was given a period of three months, ie until 26 January 2002 to settle the balance. However, the plaintiff was given an extension of time by this court, upon an application made by him, until 25 March 2002 to settle the balance. Accordingly, on 22 March 2002, the plaintiff settled the balance price of RM524,520. On 24 January 2002, the plaintiff filed the present application to remove the defendant's private caveat on the said land.

Primary issues

There are two primary issues before the court:

- (1) whether the plaintiff is an aggrieved person within the ambit of s 327(1) of the NLC; and
- (2) whether the defendant's caveat dated 10 October 1996 which was entered after the said land was charged on 26 September 1996, should be removed, which calls for an enquiry into whether the defendant had any caveatable interest in the said land.

Whether the plaintiff is an aggrieved person

The present application by the plaintiff to remove the defendant's caveat is made under s 327(1) of the NLC which reads as follows:

Removal of private caveats by the Court

- (1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just.

Therefore, in order to bring his present application within the ambit of s 327(1) of the NLC, the plaintiff must satisfy the court that he is an 'aggrieved party'. The terms 'aggrieved party' is not defined anywhere in the NLC. However, in the case of *ex p Sidebotham* (1880) 14 Ch D 458, it was accepted that 'a person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully affected his title to something'. In *Wu Shu Chen (Sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487, the Court of Appeal ruled at p 499 that:

... the word 'aggrieved' must be given its ordinary meaning. To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body. The category of aggrieved persons is never closed.

- A Therefore, for the purpose of s 327(1) of the NLC, the plaintiff must be aggrieved by the existence of the defendant's private caveat entered on 10 October 1996. He must show that his legal right or interest, as a bona fide purchaser of the said land at a public auction, was adversely affected by the said caveat. From the facts of the present application, it is clear that the mere existence of the defendant's caveat adversely affects the plaintiff's interest in the said land. The plaintiff may find difficulty in any dealing involving the said land unless the said caveat is removed. The defendant argued that the plaintiff knew about the caveat when he bid for the said land at the public auction. The existence of the said caveat was also mentioned in the proclamation of sale. Therefore, the defendant concluded that the plaintiff's right or interest on the land must be subjected to the existence of the said caveat. With respect, I cannot agree with the defendant's argument on this issue. The plaintiff's right or interest on the land is derived from a judicial process through an order for sale which was legally granted by the court. His right or interest on the land started when he successfully bid for the land and paid the deposit. In fact, in this case, the plaintiff had already paid the full price of the land on 22 March 2002, before this application came up for hearing. Though the plaintiff may have had knowledge of the caveat earlier, it did not prevent him from being an aggrieved person for the purpose of s 327(1) of the NLC. On this issue, I am in full agreement with Faiza Tamby Chik J (as he then was) in the case of *BSN Commercial Bank (M) Bhd v Thomas Selvaraj Soosai* [1998] 4 CLJ Supp 97, when he said:
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The plaintiffs could be aware of the defendant's interest on the said property and even the existence of the caveat, but one cannot deprive the plaintiffs of their legal capacity of being an aggrieved party. The plaintiffs are aggrieved because in law something wrongful has been done to them that affected their title to the property. Though they may have had knowledge of the caveat earlier, it did not prevent them from being an aggrieved party in law.

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In *Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd* [1992] 2 MLJ 650, the then Supreme Court held that 'the appellant in that case is clearly the aggrieved body having paid the full purchase price for the land at a judicial sale and was in possession of the certificate of sale and the issue of title to the subject land. They have satisfied the test in *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212, where Lord Diplock said at p 215:

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It is otherwise when the applicant, under s 327, is someone other than the caveatee. He has no registered title to rely upon as prima facie evidence of his interest in the land. It is for him to begin by satisfying the court that there are sufficient grounds in fact and law for treating him as a person claiming such an interest in the land as would, if it were established, make him aggrieved by the existence of the caveat.

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On the above authorities, I have no hesitation to hold that the plaintiff in the present application, is an 'aggrieved party' and therefore is entitled in law (s 327(1) of the NLC) to apply to the court to remove the defendant's caveat, and the court may exercise its powers accordingly under the said s 327(1) of the NLC to consider and to grant the application as it thinks fit.

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Whether the defendant's caveat should be removed

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The second issue is more crucial to the present application, ie whether the defendant's caveat should be removed. This may call for an enquiry into whether the defendant had any 'caveatable interest' in the said land at the time when the caveat was entered.

In *Luggage Distributors (M) Sdn Bhd v Tan Hor Tang* [1995] 1 MLJ 719, the Court of Appeal laid out the following at p 723:

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In considering an application for the removal of a caveat, the procedure to be adopted should be a simple and summary one. At the first stage, the court will examine the grounds expressed in the application for the caveat to see whether they show a caveatable interest. Once the court is satisfied that the caveator's claim amounts in law to a caveatable interest, it must then go on to consider whether the claim discloses a serious question meriting a trial. After these two stages have been crossed, the court must decide where the balance of convenience lies.

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The above principle was followed by two other Court of Appeal cases namely: (i) *Murugappa Chettiar Lakshamanan v Lee Teck Mook* [1995] 1 MLJ 782; and (ii) *Shu Chen & Anor v Raja Zainal Abidin Raja Hussin*.

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The first stage involves a determination of whether the defendant has any caveatable interest when he lodged his caveat on 10 October 1996. The defendant relied on the two sale and purchase agreements dated 31 January 1975 and 28 February 1978 to show that he had purchased the said lands from the vendors and had paid the full purchase price. However, in Form 19B dated 8 October 1996, he had just disclosed one agreement, ie the 1978 agreement. There is no mention at all about the earlier 1975 agreement which formed the basis for the alleged transaction. The first 1975 agreement was executed when the defendant paid the initial deposit of RM22,800, while the second 1978 agreement was executed when the defendant paid the full amount of the purchase price. In both the agreements, the vendors were four individuals, namely Eng Kwee, Eng Kin Soon, Eng Kim Hai and Eng Gim Siah who claimed to be the 'beneficial and registered owners' of the said lands. It is not disputed that the said lands were at all material times registered under the name of Eng Kwee & Sons Construction Sdn Bhd, a company incorporated under the Companies Act 1965. The defendant claimed that all the four individuals who claimed to be the vendors of the said lands were directors of the said company. However, there is nothing in the said agreements to show that they entered into the agreements as directors of the company or for and on behalf of the company. In fact they claimed to be the 'beneficial and registered owners' of the said lands. There was no record or evidence to show that they were the registered owners of the lands at the material times. The registered owner was the company, Eng Kwee & Sons Construction Sdn Bhd. The company is, in law, a separate legal entity. The right as to the titles of the said lands was with the company when the said agreements were entered into. The four individuals who claimed to be the vendors had no right as to the titles or interest on the said lands, when they executed both the agreements. Therefore, they cannot transfer or sell the land to the

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- A** defendant or to anybody. One who has no right cannot pass any right to any other person. Therefore, the defendant, despite having entered into both the agreements and having paid the so called 'purchase price' in full, obtained no right or interest on the land. Without the right or interest, the defendant had no caveatable interest on the land, and the caveat entered into by the defendant on the said land on 10 October 1996 ought to be removed.
- B**

The last of the two agreements was executed on 28 February 1978. On the same date, the balance of the purchase price of RM22,800 was paid in full and the vendors acknowledged receipt of the same. Clause 3 of the said agreement provides that:

- C** The vendors hereby agree to execute a valid and registrable memorandum of transfer pertaining to the 2 (two) lots immediately to be retained by the solicitors of the parties hereto, Messers KS Bhal & Company, Advocates and Solicitors, First Floor, Rooms A & B, Wisma Swee Lee, Mentakab, Pahang with such instructions to do the needful.
- D** The clause clearly stipulates that the vendors must execute a valid and registrable memorandum of transfer pertaining to the said lands immediately, ie immediately after the signing of the agreement on 28 February 1978. Apparently, there was no such memorandum of transfer executed by the vendors and therefore the land was not transferred at all to the defendant. The defendant did nothing to enforce the agreements after that. The only thing the defendant did was to enter his private caveat on 10 October 1996, after the said land was charged to Malayan Banking Bhd. Even after that, the defendant still did nothing to enforce the agreements or to get the land transferred to him, not until today. The failure on part of the vendors to execute a valid and registrable memorandum of transfer immediately after the signing of the agreement on 28 February 1978 should have triggered off timeous legal action on part of the defendant against the vendors. It appeared clear to me that the defendant's cause of action for the recovery of the said land accrued when the vendors failed or defaulted to execute the memorandum of transfer. The time began to run on 28 February 1998 or immediately after that. In order to prevent limitation from setting in, the defendant, assuming he had the legal capacity, must institute his action within 12 years from that time. The defendant failed to do so. The provisions of s 9 of the Limitation Act 1953 are very clear on this matter. It reads as follows:
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Limitation of action to recover land:

- H** (1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

- I** The defendant entered his private caveat on 10 October 1996, ie more than 18 years after 28 February 1978. By that time, whatever action he wished to take to enforce the agreements would be time barred and the agreements had become unenforceable. That being the case, the defendant had no

caveatable interest when he entered the caveat on 10 October 1996, and therefore, the caveat ought to be removed.

In *Wu Shu Chen & Anor v Raja Zainal Abidin Raja Hussin*, the Court of Appeal removed a caveat entered by a caveator who claimed that the land in question was held by the registered proprietor as trustee for them. One of the grounds for such removal was that the caveator failed to initiate any action for the recovery of the said land within 12 years from the date the cause of action accrued. In that case, Mokhtar Sidin JCA, has this to say at p 509:

It appeared clear to me that Ming Shu Syndicate's cause of action for the recovery of the said land accrued when Long had failed or defaulted to deliver the transfer and the issue document of title to the said land on 4 November 1968 when time began to run. In order to prevent limitation from setting in, Ming Shu Syndicate, assuming it had the legal capacity, must institute its action within 12 years from 4 November 1968. This it clearly failed to do, and it has only itself to blame. The provisions of s 9 of the Limitation Act 1953 are clear.

In the present application, the onus was on the plaintiff to show that he was an aggrieved person under s 327(1) of the NLC (see *Eng Mee Yong v Letchumanan* [1979] 2 MLJ 212). Once the plaintiff had satisfied the court that he was a person aggrieved by the existence of the caveat (which he had), the onus would be on the defendant as caveator to satisfy the court that he had a caveatable interest on the land that his claim raised serious questions to be tried, and having so satisfied the court, the defendant as caveator must go on to show that, on the balance of justice, it would be better to maintain the caveat. This same principle was followed and applied by the Court of Appeal in *Wu Shu Chen & Anor v Raja Zainal Abidin Raja Hussin*.

In the present case, based on the above considerations, I am satisfied that the defendant has failed to show that he had a caveatable interest when he entered the caveat on 10 October 1996. Therefore, he failed to pass through the first stage established in *Luggage Distributors*. On this ground alone, the caveat ought to be removed, without having to go to the second stage.

In the event I am wrong in coming to the above conclusion, I shall now proceed to deal with the second stage, ie whether the defendant's claim as caveator, disclosed any serious questions meriting a trial.

As I have stated earlier, the strength of the defendant's claim on the lands is based on the two sale and purchase agreements which were executed on 31 January 1975 and 28 February 1978. The vendors (four individuals) who executed the agreements, claimed to be the beneficial and registered owners of the said lands, while in actual fact the said lands were at all material times registered under the name of Eng Kwee & Sons Construction Sdn Bhd, a private company incorporated under the Companies Act 1965 with a separate legal entity. There is no indication at all in both the agreements to show that all the four individuals executed and signed the agreement for and on behalf of the company. These facts can clearly be established from all the affidavits and documents exhibited

A thereto. There is no necessity to go for trial to determine these issues. I have also stated earlier that at the time when the defendant entered his caveat on 10 October 1996, the said agreements were not enforceable anymore because of the limitation period as provided under s 9 of the Limitation Act 1953. Again, there is no necessity to go for trial to establish this issue.

B Based on all the available affidavits and relevant documents exhibited thereto, I have concluded that the defendant has no caveatable interest at the time when he entered the caveat. Again, there is no necessity to go for trial to come to this conclusion. In the circumstances, I am satisfied that there is no serious question meriting a trial in the present case. I therefore, conclude that the defendant has also failed to pass through the second stage in proving his claim. Again, on this ground alone, the caveat can and ought to be removed.

For the sake of completeness, I shall now proceed to deal with the third stage, ie where the balance of justice or balance of convenience lies.

D In the present case, the lands in question were at all material times registered under the name of Eng Kwee & Sons Construction Sdn Bhd, a private company incorporated under the Companies Act 1965 with its own legal entity. Just before the land was charged in favour of Malayan Banking Bhd on 26 September 1996, the said lands were free of any encumbrances. Therefore, the charge was properly registered. Section 340(1) of the NLC confers an indefeasible interest in the land on the chargee upon registration of the charge unless it is made defeasible by s 340(2) of the NLC in cases of fraud, forgery, misrepresentation or illegality, which do not arise in the present case. The defendant entered his private caveat only on 10 October 1996, ie about 14 days after the charge was duly registered. By that time, the chargee's interest in the said land was already indefeasible. In fact the defendant, in his affidavit deposed that he entered the caveat when he came to know about the charge being created in favour of the bank. That being the case, the caveat did not in any way affect the indefeasibility of chargee's interest in the said land. Therefore, when the said land was sold at a public auction by virtue of an order for sale duly granted by the court, the indefeasibility of the interest shall then pass through to the purchaser who had successfully bid for the land. This proposition was clearly established by the Supreme Court in *Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd* [1992] 2 MLJ 650, where it was held, that at pp 658–659:

H In any event, the fact of registration of the charge is notice to all the world of its existence. Any dealing subsequent to the charge and with notice of the charge, as here, cannot defeat the indefeasible interest of the registered chargee and through him the purchaser at a judicial sale. The error in this case was to ignore the indefeasible title of the chargee and the continuous legal operation of the charge from the moment of its registration up to the completion of the judicial sale and the issue of the certificate of sale.

I The plaintiff came into the picture just at the conclusion of the public auction held on 26 October 2001. He had successfully bid for the said land. He was a bona fide purchaser, who knew nothing as to what had transpired before the auction. Of course he knew about the private caveat entered by

the defendant after the charge was registered. That information was endorsed in the proclamation of sale itself. There is nothing wrong legally for the plaintiff to bid for the land in question, knowing fairly well the strength of a caveat entered into after the registration of the charge. As what had been said by Mokhtar Sidin JCA in the case of *Wu Shu Chen & Anor v Raja Zainal Abidin Hussin*, 'by itself a private caveat is not a remedy, and it does not create an interest in land'. The plaintiff did the correct thing when he applied for the caveat to be removed under s 327 of the NLC after he had purchased the said land at the public auction. Up to this stage, all the requirements of the law have been complied with. The charge had been properly created. The chargee had applied for an order for sale of the land when the borrower or the chargor failed or defaulted in their obligations. Under s 256(3) of the NLC, on an application to the court for an order for sale by the chargee, it is mandatory on the court to order the sale unless it is satisfied of the existence of a cause to the contrary. No such cause to the contrary arose in this case when the order for sale was made on 29 August 2001. The defendant complained that he was not notified of the foreclosure proceedings initiated by the chargee. However, the court is of the view that there is no necessity for the chargee to notify the defendant because the defendant's caveat was only entered after the charge was created and therefore it does not affect the indefeasible interest of the chargee.

The caveat by itself was insufficient to create a cause to the contrary for the purpose of s 256(3) of the NLC.

The plaintiff has paid a deposit of RM58,280 on the auction day itself and was given three months, ie until 25 January 2002, to settle the balance of RM524,520. Being unable to comply with the three months' period given to him, the plaintiff applied to the court for an extension of time, ie a further 60 days from 25 January 2002, to enable him to finalize a bank loan to settle the balance of the purchase price. The application was granted by the court. Therefore, the plaintiff must complete the sale on or before 25 March 2002. For an order for sale granted before 1 December 2001, (as in the present case) the court has the discretion to grant an extension of time to enable the purchaser to complete the sale and to pay the balance of the purchase price. However, with effect from 1 December 2001, an amendment to s 257(1)(g) of the NLC was effective vide Act A1104 (which was gazetted vide PU (B) 559/01) where it was specifically provided that the balance of the purchase price shall be settled on a date not later than 120 days from the date of the sale and that there shall be no extension of the period so specified.

On the strength of the extension of time granted by the court, the plaintiff had completed the sale by settling the whole balance of the purchase price on 22 March 2002. The defendant again complained that the said order of the court granting the extension of time to the plaintiff was invalid on the ground that he was not notified or consulted prior to the making of the order. I must stress here that any order made by the court must be held to be valid and effective until it is set aside or overruled or reversed by a higher court on appeal. In the present case, the defendant, who claimed that the order of the court granting extension of time to the plaintiff was invalid, had never filed any application to set aside the order or

A to appeal to the Court of Appeal, even until today. If the defendant was really serious in his claim on the lands in question or really confident that there were merits in his claim, he should have applied to the court to set aside the order for sale which was granted earlier on 29 August 2001. He has not done so until today.

B Based on the above considerations, I am fully satisfied that the balance of justice or the balance of convenience lies in favour of the plaintiff, ie for the removal of the defendant's caveat dated 10 October 1996.

Conclusion

C It is therefore my judgment that the plaintiff's application vide encl 4 be allowed with costs.

Order accordingly.

Reported by Peter Ling

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